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No. 82-1635

IN THE

Supreme Court of the United States

October Term, 1982

PAUL A. LANIGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

Pursuant to Rule 22.5 of the United States Supreme Court Rules, Petitioner hereby submits his Reply Brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

1. The United States argues (Brief at 11) that it need not prove harm to the environment in order to sustain a Refuse Act or Clean Water Act conviction and that the government's evidence demonstrated environmental harm resulting from to the operation of Moyer's Landfill. The law requiring that the government establish a measurable harm to the environment in order to meet its burden under the Clean Water Act and Refuse Act has been set forth in the cert petition. The evidence negating any measurable harm to the environment is discussed herein.

The government relied upon the testimony of its witness, Dr. Jane Massey, in order to attempt to prove diminished water quality in Skippack Creek. It made no attempt to prove diminished water quality in Eagle Stream, the other waterway allegedly "polluted" by Moyer's Landfill. Dr. Massey compared "storet" data for Skippack Creek for the periods 1950 to 1978, and 1978 to 1980 (the periods for which E.P.A. maintained and established such data). Storet data was obtained both immediately upstream and downstream from Moyer's. Dr. Massey testified that the downstream samples for certain pollutants were greater in the period from 1978 to 1980 than they had been from 1950 to 1978. Based upon the worsening of the downstream water quality, the government contended that Moyer's necessarily polluted Skippack Creek.

What Massey failed to do, however, was to compare the storet data for the upstream and downstream stations, from 1950 to 1978 and from 1978 to 1980. Dr. John Keenan, a Professor of Environmental Engineering at the University of Pennsylvania, did this analysis based on Dr. Massey's data. He testified, without contradiction, that there was no evidence whatsoever that the landfill had any adverse impact on the Skippack Creek because the downstream data was not different from the upstream

data in each time period compared. "Well, when one looks at the [EPA] data, one cannot see a difference between the upstream point and the downstream point, and therefore you cannot make any determination about changes in the [water] quality". By measuring only the downstream samples, Massey did pick up increases in certain pollutants; however, those pollutants obviously did not come from Moyer's Landfill. Had their source been the landfill, then the upstream samples would not have reflected the same pollutants as the downstream samples for each of the periods reflected in the storet analysis.

Donald Knorr, a DER employee, took upstream and downstream Skippack Creek samples on May 12, 1980. He reluctantly conceded that he found "no significant difference" between these analyses. The government introduced no evidence of any adverse impact on any water nor did it seek to introduce any analysis of Skippack Creek which it had taken because they demonstrated no adverse impact on the water. The reason for this seeming anomoly is clear. Although landfill leachate in containment vessels may have contained heavy concentrations of perameters which worsen water quality, the quantity of leachate, if any, reaching the water was de minimus and/or the source of leachate reaching the waters was not the containment vessels themselves. Thus, when Dr. Massey testified that despite no measurable impact on the Skippack from the landfill, there would nonetheless be a "specific zone" due to higher concentrations of metals which would "create a zone where normal acquatic life can no longer exist", she assumed substantial leachate discharges. She conceded, however, that she did not know the quality or quantity, if any, of leachate actually entering the Skippack.

In fact, a government witness testified that on May 24, 1980 — a date subsequent to all but one of the indictment charges before the jury — he and his son were *fishing* in the Skippack where the alleged leachate discharges had been occurring for a period of years. Thus, obviously no "septic zone" existed, and no worsening of the quality of any water was established.

2. The United States contends that since certain collection basins near the west and south side of the landfill were not lo-

cated on landfill property [Br.3], and/or since Petitioner allegedly consented to warrantless searches and seizures of leachate from these collection basins, Petitioner's motion to suppress the fruits of those searches was properly denied. The United States also argues that since landfills are pervasively regulated, no warrant of any kind need have been secured so that Petitioner's motion to suppress was properly denied. The government's arguments are factually and legally insufficient. Conceding no warrant, and in absence of any evidence suggesting a random, neutral administrative inspection scheme, the government suggests that the mere fact of regulation is sufficient to circumvent the Fourth Amendment. Obviously, were this the law, then *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) would have been decided differently, and *Donovan's v. Dewey's fulcrum* — "the only real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant", *Donovan v. Dewey*, 101 S.Ct. 2530, 2540 — would be mere surplusage. The Federal Clean Water Act parrots the language found infirm by this Court in *Barlow's*, which permits the administrator a "right of entry" exercisable at "reasonable times" to copy records and sample effluents, 33 U.S. §1318(a)(B)(i) and (ii), but only such records and effluents which the *operator* is required to maintain or sample. No such requirement of sampling was ever imposed on Petitioner. Therefore, the samples seized were taken in violation of the Act itself, even were its inspection program able to pass constitutional muster.

The Refuse Act does not purport to permit warrantless entries for enforcement purposes. The *Pennsylvania Solid Waste Act*, 35 P.S. §6001 *et seq.*, and the *Pennsylvania Clean Stream Act*, 35 P.S. §691.1 *et seq.*, contain absolutely no provisions which even imply the bounds, if any, of an inspection program nor a regularized right of entry, nor the right to remove samples.

Therefore, the United States is forced to rely upon "consent" to justify the warrantless searches. Respecting "consent",

the record is uncontradicted in the following regards: (a) for numerous entries, no consent from Mr. Lanigan, or any other person, was either sought or obtained; (b) no one advised Mr. Lanigan of the right to refuse entry or to preclude the taking of samples, absent a warrant; (c) no one advised Mr. Lanigan of his right to have samples seized by the government divided so that he could have the samples tested independently; (d) no consideration was given by the government to obtaining a search or administrative warrant; (e) no one advised anyone that samples, observations or photographs could be used in a criminal proceeding; and (f) no one wished Mr. Lanigan to know the true purpose of the searches; the pursuit of citizen complaints, and government investigations about landfill operations, with a view towards potential criminal prosecution.

Indeed, DER Inspector Thomas Sheehan testified that Mr. Lanigan never objected to agents on the premises because "we both thought I had a right to go on". Since all parties assumed a right of entry and seizure, and no suggestions of future criminal proceedings or uses of these materials were raised either directly or indirectly by any governmental agents through their statements, credentials, or absence of uniforms, no consent can possibly be claimed to here exist. Any consent claimed to amount to a relinquishment of a Fourth Amendment right must be voluntary; *i.e.*, freely and intelligently given:

> "When a prosecutor seeks to rely upon consent to justify a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiesence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

See also, United States v. Jones, 641 F.2d 425, 429 (6th Cir. 1981) ("the burden of proving a valid consent was on the government, and, as we have repeatedly held, this burden required 'clear and positive' proof that the consent was uncontaminated by duress, coercion or trickery.") Here the United States proved no more than periodic acquiescence to a claim of lawful authority, which acquiescence was based on withholding information

from Petitioner. Thus, no consent was obtained for any warrantless entry.

Given the fact that no one was even consulted respecting numerous entries, and the facts as set forth above, the government now argues that the suppression motions were properly denied because some of the basins were not on landfill property. It is correct that at a suppression hearing on December 14, 1981, testimony was elicited from a government witness to the effect that collection basins at the west and south sides of the landfill might not be located on Moyer's property. What the United States has failed to disclose is that this question arose in the context of whether observations by citizens who may have trespassed onto Moyer's property could be admitted into evidence at trial. Obviously, that question is irrelevant to the Fourth Amendment issues here raised. Indeed, the land on which the landfill sat was never owned by Moyer's; Moyer's was merely a corporation which owned the landfill business, the property on which it sat being owned by third parties. However, whether located on or off the geographic boundaries of the land owned by these third parties, it is uncontroverted that the basins themselves were the property of Moyer's. Therefore, Mr. Lanigan as corporate owner of the basins may properly raise these claims, whose determination hinges on traditional Fourth Amendment analysis. *Rakas v. Illinois*, 439 U.S. 128, 138-39, 147 (1978), *reh. denied*, 439 U.S. 1122 (1979); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Salvucci v. Jones*, 100 S.Ct. 2547 (1980).

Here, regardless of the actual property boundaries, Moyer's, EPA, DER, and the citizenry assumed both Moyer's proprietary interest in and privacy rights respecting the basins; therefore, the warrantless searches and seizures were unconstitutional.

3. The United States relies on "the poor condition of the leachate collection basin system" in order to establish negligence on the part of Petitioner. [Br. 5] The government also seeks to impose criminal liability on Mr. Lanigan through observations of persons on precious few days as to the existence of such "poor condition", in an effort to establish his negligence.

The evidence, however, is overwhelming that Mr. Lanigan did, in fact, direct daily that the first order of business was to assure that the collection basin system was inspected and maintained. One Chapman Redman was specifically delegated the daily task to inspect all pipes, lines and basins both on and off the landfill, which task he stated he performed. In connection with the maintenance of the system, however, vandalism was a major and continuous problem. Acts of vandalism testified to included pipes being shot, broken and pulled apart; pumps being turned off and switches broken; and the setting of suspicious fires. Some of these acts of vandalism, contemporaneously reported to the police, were reflected in police reports, which reports the court refused to admit into evidence.

Thus, the record discloses a daily diligence on the part of Mr. Lanigan, directing his employees to maintain the integrity of the leachate collection system. The government relies on "a hole in the side of [a] basin in 1978 and 1980 [which allowed leachate to escape into a creek]." There was no such hole in 1978.

4. The government also relies upon Petitioner allowing "customers to dump sludges containing a substantial amount of liquid at the landfill, thus aggravating the leachate problem." [Br. 6]. The government has failed to advise this Court that, as the evidence at trial reflected, every customer who dumped sludges containing substantial liquid at the landfill, did so only after obtaining prior authorization and approval from DER, the agency charged with monitoring and assuring compliance with state and federal pollution laws.

5. In connection with its argument that "gross negligence — the functional equivalent of willfulness" — need not be established in order to sustain a Clean Water Act conviction, the United States relies on the case of *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (1979), *cert. denied*, 444 U.S. 1074 (1980). In *Frezzo*, the Third Circuit Court of Appeals did uphold a conviction under the Clean Water Act for negligent discharge of pollutants. *Frezzo*, however, never discussed much less decided whether gross negligence was required or whether gross negligence had been proved by the government in that case. Thus, *Frezzo* is of little solace to the United States.

6. In his cert petition, Petitioner established how the government attempted to establish its claim of negligence through reliance on the testimony of one Gary Brown, who, testifying from a total absence of first-hand observations during the period in question, and relying on concededly erroneous assumptions, used a "water balance method" which led him to assume that the landfill had generated more leachate than it was capable of absorbing. The government seized upon this purported "excess leachate" through testimony and argument, contending that Mr. Lanigan's failure to haul 50,000 gallons of leachate per week to the borough of Bridgeport, resulted in leachate discharges from the landfill of "excess leachate", and established negligence. In the cert petition, Petitioner has established how the existence of "excess leachate" is a figment of Mr. Brown's imagination, unsupported by eyewitness observations of both residents and regulatory personnel of DER and the EPA.

Petitioner has argued that all Brown's testimony should have been excluded since the "water balance method" is inadmissable. Petitioner established that the record is clear that no court of law had accepted the water balance method and that, when a purported scientific test is the predicate for an expert's opinion, the government has at least some burden of establishing the reliability and accuracy of the test. This the United States failed to do.

The United States has responded by misconstruing Petitioner's argument, stating that Petitioner argues that Brown's testimony should have been excluded merely because the methodology has not previously been accepted by a court. [Br. 13]. Petitioner has argued no such thing. All that Petitioner has contended is that where methodology has not previously been determined by a court to be reliable, the government must establish by clear and convincing evidence that the scientific technique is reliable. This task was not undertaken by the government in connection with its prosecution of Petitioner herein. Therefore, Brown's testimony should not have been admitted. Had such testimony not been admitted, the jury might not have found negligence, or even a violation under the Refuse Act. Therefore, it is submitted not only that the trial court errone-

ously permitted Mr. Brown to testify, but also that the testimony was a significant factor in connection with the verdicts of guilty which were returned. This averment is supported by the jury determination. Brown testified that excess leachate would have occurred in 1980. Mr. Lanigan was acquitted of all charges eminating from allegations of Clean Water Act and Refuse Act violations in 1978, being convicted on only some charges in the year 1980.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,
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